No. 19-8473

In the
Supreme Court of the United States

SHAWN ROGERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

Where a capital sentencing scheme operates so as to demand–before a defendant is *eligible* for death–determinations that are not purely factual and involve normative judgment, those determinations must be made beyond a reasonable doubt. The Florida Supreme Court's contrary decision conflicts with this Court's decisions. It is also wrong. And the question presented has considerable practical impact. It also offers this Court an opportunity to clarify analytical tension in a critical area of its jurisprudence. This Court should grant review.

For its part, the State attempts to manufacture vehicle problems by asserting the Florida Supreme Court's decision was based on state law. But a conclusive presumption exists that the court decided the case the way it did because it believed federal law required it to do so. In short, its decision fairly appears to rest primarily on federal law and does not clearly and expressly indicate it was based on state law.

The State also claims the decision does not conflict with this Court's decisions. But that claim is largely built on a faulty premise–that the court based its decision on state law. Further, this Court's decisions do not establish that only purely factual determinations are subject to the requirement of proof beyond a reasonable doubt.

Finally, the State attempts to justify the decision with various contentions. But the State fails to appreciate multiple truths. Among others, the appropriate analysis concerns the operation and effect of Florida's capital sentencing scheme as applied and enforced by the state. Also, it is a state's prerogative, rather than this Court's, to define the category of persons eligible for the death penalty. And the beyond-a-

reasonable-doubt standard of proof can be perceived in terms of the level of confidence that the decision-maker should have in his or her determination.

I. This Case Is a Suitable Vehicle for Addressing The Exceptionally Important Question Presented.

The Florida Supreme Court based its decision on federal law. It decided that, under the Due Process Clause and this Court's *Apprendi* lines of cases, no error occurred when the trial court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances.

1. The State essentially claims the court's decision was based on state law. Opp.9-13. More specifically, it appears to argue the court based its decision on the ground that any error related to instructing the jury was not "preserved." Opp.9-11. Alternatively, the State appears to assert the court based its decision on the ground that, even if such error occurred, the error was not "fundamental." Opp.9-11.

The Florida Supreme Court's decision, however, was based on federal law. "State courts, in appropriate cases, are not merely free to–they are bound to–interpret the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995). But in "doing so, they are *not* free from the final authority of this Court." *Id.* at 8-9.

> To that end, [this Court] announced, in *Michigan v. Long*, 463 U.S. 1032 (1983), the following presumption:
>
> > "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way

> it did because it believed that federal law required it to do so."
>
> At the same time, [this Court] adopted a plain-statement rule to avoid the presumption: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Florida v. Powell, 559 U.S. 50, 56-57 (2010) (internal citations omitted).

Further, the "*Long* 'plain statement' rule applies regardless of whether the disputed state-law ground is substantive . . . or procedural." *Harris v. Reed*, 489 U.S. 255, 261 (1989).

> Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this court from reaching the federal claim: "[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." Furthermore, ambiguities in that regard must be resolved by application of the *Long* standard."

Id. at 261-62 (internal citations omitted).

Applying that rule here, a conclusive presumption exists that the Florida Supreme Court decided the case the way it did because it believed federal law required it to do so. In short, its decision fairly appears to rest primarily on federal law, and at a minimum, does not clearly and expressly indicate it was based on state law.

To begin, Rogers contended that, under the Due Process Clause and this Court's *Apprendi* line of cases, error occurred when the court failed to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances. App.50-61, 73-82, 87-92. And the State joined issue on that point. Answer Brief of Appellee at 27-31, *Rogers v. State*, 285

So.3d 872 (Fla. 2019) (No. SC18-150).

Presented with that argument, the Florida Supreme Court concluded: "the trial court did not err in instructing the jury." App.21. In the process of reaching that conclusion, the court highlighted that it had previously considered "the requirements of *Hurst v. Florida* 136 S. Ct. 616 (2016), . . . but ultimately declined to include a standard of proof for these determinations." App.20.

The court also cited *Foster v. State*, 258 So.3d 1248 (Fla. 2018). App.20. There, it had cited *In re Winship* 397 U.S. 358, 364 (1970), for the proposition that "[p]roof beyond a reasonable doubt extends to every element of the crime." 258 So.3d at 1251. But it had then proceeded to conclude the determinations at issue "are not elements of the capital felony of first-degree murder," but rather sentencing factors. *Id.* at 1252.

Admittedly, at trial, Rogers acquiesced to using the standard second-phase jury instruction. R.6812-19, 6886-95, 6917-18. And on appeal, he contended the error at issue was fundamental. App.63-67. But the Florida Supreme Court is more than capable of concluding that, even though error occurred, the error is not fundamental. In fact, as to a separate issue raised below, the court decided that certain out-of-court statements "were irrelevant," but their admission "did not rise to the level of fundamental error." App.22.

Despite that capability, the court did not reach such a conclusion concerning the omission at issue here. Instead, it concluded no error occurred in the first place; it stated: "the trial court did not err in instructing the jury." App.21.

In those circumstances, the Florida Supreme Court's decision fairly appears to

rest primarily on federal law. At a minimum, the decision does not clearly and expressly indicate it was based on state law. In particular, it does not clearly and expressly indicate it was based on the ground that any error was not "preserved" or, even if error occurred, the error was not "fundamental." App.19-21.

This Court's prior decisions reinforce that reality. For instance, in *Hildwin v. Florida*, 490 U.S. 638, 641 (1989), *overruled on other grounds by Hurst*, 136 S. Ct. at 616, Hildwin "did not present th[e] issue [raised on appeal] to the trial court, but raised it for the first time in the Florida Supreme Court." The State "therefore argue[d] that the decision below rest[ed] on an adequate and independent state ground." *Id.* But this Court rejected that argument, and reasoned: "The Florida Supreme Court . . . did not rest its decision on this procedural argument, finding instead that there was 'no merit' to petitioner's claim." *Id.*

Like Hildwin, Rogers did not present the issue raised on appeal to the trial court, but raised it for the first time in the Florida Supreme Court. But as it did in *Hildwin*, in the present case, that court did not rest its decision on this procedural argument; instead, it found that Rogers' argument was "without merit," App.19. Thus, if the decision there was based on federal law, the same is true here.

2. On a different note, the State faults Rogers for not asking "this Court to resolve th[e] state-law issue" of whether the error related to instructing the jury was fundamental. Opp.11-12. And the State proceeds to argue that, under Florida law, any such error was not fundamental. Opp.12-13.

That issue, however, is separate from the federal question decided by the Florida

Supreme Court. And where this Court assumes jurisdiction over a case because a state court decided a federal question, this Court generally does not go further and consider separate questions of state law. *Murdock v. Memphis*, 20 Wall. 590, 627-36 (1875). Instead, if this Court concludes the state court erred in deciding the federal question, it usually remands the case for the state court to consider the separate state-law question. *See, e.g.*, *Hurst*, 136 S. Ct. at 624.

Regardless, the error related to instructing the jury was fundamental. In short, under Florida law, fundamental error occurs "when the omission [of a jury instruction] is pertinent or material to what the jury must consider in order to convict." *Daughtery v. State*, 211 So.3d 29, 39 (Fla. 2017). And here, the omission of an instruction that the determinations at issue had to be made beyond a reasonable doubt was pertinent to what the jury had to consider to conclude that Rogers should be sentenced to death.

II. The Florida Supreme Court's Decision Conflicts With This Court's Decisions, Including the *Apprendi* Line of Cases.

This Court's decisions establish two basic propositions: (1) determinations as to the functional equivalents of elements must be made beyond a reasonable doubt, and (2) determinations that increase the penalty for a crime are the functional equivalents of elements. Under Florida's capital sentencing scheme, the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for first-degree murder. But the Florida Supreme Court decided those determinations do not have to be made beyond a reasonable doubt. That decision conflicts with this Court's decisions.

1. The State claims this Court's decisions have not addressed "whether a trial court commits 'fundamental error' within the meaning of Florida law when it" fails to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances. Opp.13-14.

The Florida Supreme Court, however, did not base its decision on the ground that, even if an error related to instructing the jury occurred, the error was not fundamental. Instead, the court based its decision on federal law. *See* discussion *infra* pp. 3-5. In particular, it decided that, under the Due Process Clause and the *Apprendi* line of cases, the determinations at issue do not have to be made beyond a reasonable doubt because they are not the functional equivalents of elements. App.20. And that decision conflicts with this Court's decisions. *See* Petition for a Writ of Certiorari pp. 13-25.

2. In addition, the State essentially argues this Court's decisions have established that only purely factual determinations are subject to the requirement of proof beyond a reasonable doubt. Opp.14-16. In short, the State insists only "facts" are subject to that requirement. Opp.14-16.

This Court's decisions, however, do not establish that only purely factual determinations are subject to the requirement of proof beyond a reasonable doubt. To be sure, in observing that determinations that constitute a crime or increase the penalty therefore have to be made beyond a reasonable doubt, this Court has often referred to "facts." *See, e.g.*, *Alleyne v. United States*, 570 U.S. 99, 102 (2013); *In re*

Winship 397 U.S. at 364. But, in that context, this Court has ultimately focused more broadly on "elements" or their "functional equivalents." *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000); *id.* at 494 n.19; *see also United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019).

Further, this Court has explicitly distinguished between "elements" and "facts." *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Most critically, this Court has rejected the notion that only purely factual determinations qualify as elements. *See United States v. Gaudin*, 515 U.S. 506, 511-12, 522-23 (1995).

III. The Florida Supreme Court's Decision Is Wrong.

The Florida Supreme Court failed to appreciate that the determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements because they increase the penalty for first-degree murder. It also overlooked that, even if they are not purely factual and involve normative judgment, they are susceptible to a subjective state of certitude.

1. The State claims the decision is right because the determinations at issue are sentencing factors, rather than the functional equivalents of elements. Opp.16-17, 21-22. More specifically, it maintains those determinations do not increase the penalty for first-degree murder because section 921.141, Florida Statutes, provides that, if the jury determines the existence of "at least one aggravating factor, the defendant is eligible for a sentence of death." Opp.17.

Like the Florida Supreme Court, however, the State fails to appreciate the

appropriate analysis "looks to the operation and effect of the law as applied and enforced by the state," *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). And any such analysis makes clear that, though section 921.141 states an aggravating factor renders a defendant eligible for death, it "'authorizes a maximum penalty of death [based on such a factor] only in a formal sense,'" *Ring v. Arizona*, 536 U.S. 584, 604 (2002). *See* Petition for a Writ of Certiorari pp. 16-18.

2. In addition, the State essentially argues this Court's decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), established that, as a categorical matter, any determination that the aggravating factors outweigh the mitigating factors cannot be the functional equivalent of an element. Opp.17-19. More specifically, that determination does not increase the penalty for first-degree murder because, as a categorical matter, a defendant convicted of that crime is eligible for death if at least one aggravating factor is found. Opp.17-19.

The State, however, overlooks two critical distinctions. First, this Court possesses the authority to decide what federal-constitutional-procedural requirements attach to determinations that increase the penalty for a crime, including those that render a defendant eligible for death. *See, e.g.*, *Ring*, 536 U.S. at 603-04, 609. But this Court lacks the prerogative to substantively define such determinations in the first place.

Instead, decisions about "what 'fact[s] are necessary to constitute the crime' . . . represent value choices more appropriately made in the first instance by the

legislature." *Schad v. Arizona*, 501 U.S. 624, 638 (1991). In particular, the "category of persons eligible for the death penalty" is "legislatively defined." *California v. Ramos*, 463 U.S. 992, 1008 (1983). And this Court has previously recognized that basic distinction between this Court's authority and a state's prerogative. *See Schriro v. Summerlin*, 542 U.S. 348, 354 (2004).

Against that background, in *McKinney*, this Court did cite *Zant v. Stephens*, 462 U.S. 862 (1983), for the general proposition that "a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found." 140 S.Ct. at 705. And, in *Stephens*, this Court had declared that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of person eligible for the death penalty." 462 U.S. at 878. But *McKinney* should not be read to establish that, *as a categorical matter*, a defendant convicted of first-degree murder is eligible for death if at least one aggravating factor is found. Again, it is a state's prerogative to define the determinations that render a defendant eligible for death. *Ramos*, 463 U.S. at 1008.

Second, with that in mind, Florida's capital sentencing scheme operates differently than Arizona's scheme. In particular, though a defendant convicted of first-degree murder in Arizona is eligible for death if at least one aggravating factor is found, the same is not true in Florida. *See* Petition for a Writ of Certiorari pp. 18-22.

3. On a separate note, the State basically contends the jury here actually determined beyond a reasonable doubt that the aggravating factors were sufficient to

justify the death penalty. Opp.20. More specifically, the State asserts that, per *State v. Poole*, 297 So.3d 487 (Fla. 2020), "sufficient" aggravating factors simply means at least one aggravating factor, and here, the jury determined beyond a reasonable doubt that aggravating factors existed. Opp.20.

In crucial respects, however, the 2011 scheme considered by the Florida Supreme Court in *Poole* differs from the 2017 capital sentencing scheme under which Rogers was sentenced. As a result of those differences, the jury here did not make the required determination beyond a reasonable doubt.

To begin, in *Poole*, the court did state: "for purposes of complying with section 921.141(3)(a), 'sufficient aggravating circumstances' means 'one or more.'" *Id.* at 500. But in *Poole*, the court considered "Florida's capital sentencing law as it existed in 2011." *Id.* at 495 n.3. And whereas the 2011 version of that law referred only to a determination as to "[w]hether sufficient aggravating circumstances exist," Fla. Stat. § 921.141(2)-(3) (2011), the 2017 version explicitly distinguishes between a determination as to "the existence of at least one aggravating factor" and a determination as to "[w]hether sufficient aggravating factors exist," Fla. Stat. § 921.141(2)-(4) (2017).

Further, as the 2017 version requires, the jury here was instructed it had to "find the existence of at least one aggravating factor *and* that the aggravating factors are sufficient to impose a sentence of death." R.3076, 3081 (emphasis added). Most critically, in its verdict, the jury determined beyond a reasonable doubt that multiple

aggravating factors existed, but–without referring to a standard of proof–simply determined that "the aggravating factors are sufficient to warrant a possible sentence of death." R.3041-43. In its decision, the Florida Supreme Court acknowledged both of these truths. App.12, 18.

4. The State also returns to the notion that only purely factual determinations are subject to the requirement of proof beyond a reasonable doubt. Opp.20-22. In particular, it cites *Kansas v. Carr*, 136 S. Ct. 633 (2016), and equates a determination as to whether the aggravating factors outweigh the mitigating circumstances with a determination as to "whether to show mercy." Opp.20-21.

The beyond-a-reasonable-doubt standard of proof, however, can be perceived in terms of the level of confidence that the decision-maker should have in his or her determination. *See* Petition for a Writ of Certiorari pp. 28-29. With that in mind, determinations that are not purely factual and involve normative judgment are subject to the requirement of proof beyond a reasonable doubt.

As an initial matter, in *Carr*, this Court did muse that "the ultimate question whether mitigating circumstances outweigh the aggravating circumstances is mostly a question of mercy," and it "would mean nothing…to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." *Id.* at 642. But that portion of the opinion is dictum; prior to offering up those thoughts, this Court noted it was "[a]pproaching the question in the abstract, and without reference to our capital-sentencing case law." *Id.* Further, those abstract thoughts conflate a determination as to whether aggravating factors outweigh mitigating circumstances with a

determination as to whether a sentencer should exercise mercy.

And under Florida's capital sentencing scheme, those two determinations are distinct. *See* Petition for a Writ of Certiorari pp. 21-22. In addition, even if it would be difficult to do so with respect to whether a defendant "deserves mercy," jurors could reasonably ask themselves if they have an "abiding conviction," Fla. Std. Jury Instr. (Crim.) 3.7 (2017), that the aggravating factors are sufficient and outweigh the mitigating circumstances. In short, even if those latter determinations are not subject to a quantum of proof, they are subject to a subjective state of certitude. *See* Petition for a Writ of Certiorari pp. 28-29.

5. Further, the State essentially argues that, even if the "materiality" determination in *Gaudin*, 515 U.S. at 506, was subject to the requirement of proof beyond a reasonable doubt, the same is not true as to the determinations at issue here. Opp.23. In particular, it asserts the former "was much more akin to a fact than a normative judgment" and involved the "'application-of-legal-standard-to-fact.'" Opp.23.

The materiality determination in *Gaudin*, however, does not meaningfully differ from the determinations at issue here are. The former is guided by a legal standard: whether a statement has "'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed,'" *id.* at 509. But so are the latter: (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances.

Further, the application of the materiality standard requires jurors to "'draw

[inferences] from a given set of facts,'" conduct "'delicate assessments of'" those inferences, and determine "'the significance of those inferences to him,'" *id.* at 512. Stated differently, the necessary "judgments are not binary yes-or-no decisions that depend on which version of the facts a jury believes." *United States v. Gabrion*, 719 F.3d 511, 549 (6th Cir. 2013) (Moore, J., dissenting). Instead, jurors are "required to engage in a balancing of the objective facts with personal and moral judgment." *Id.* at 548.

But the exact same can be said regarding the application of the "sufficiency" and "weighing" standards at issue here. *See* Petition for a Writ of Certiorari pp. 28. It can also be said regarding multiple elements and their functional equivalents. *See* Petition for a Writ of Certiorari pp. 30-31.

6. Finally, the State claims Rogers "substantial expansion of the *Apprendi* doctrine would have significant and troubling practical implications." Opp.24-25. In particular, it appears to suggest reversing the Florida Supreme Court's decision would lead to (1) federal trial judges having to determine beyond a reasonable doubt whether "the chosen sentence is 'not greater than necessary' to effectuate 'the purposes set forth in'" 18 U.S.C. § 3553(a) (2020); and (2) juries having to determine beyond a reasonable doubt whether death is the appropriate sentence. Opp.24-25.

But the State's parade of horribles will not come to pass. Unlike the determinations at issue here, a determination as to whether "the chosen sentence is 'not greater than necessary' to effectuate 'the purposes set forth in'" 18 U.S.C. § 3553(a)

"does not increase the statutory maximum." *Gabrion*, 719 F.3d at 550 (Moore, J., dissenting). Instead, it simply guides the sentencing judge to impose a less-than-maximum punishment when such a punishment would suffice to effectuate the relevant purposes.

Similarly, a determination that death is the appropriate sentence does not increase the maximum punishment for first-degree murder. Instead, that determination–whether binding or advisory–*is* "the ultimate sentencing decision within the relevant sentencing range," *McKinney*, 140 S.Ct. at 707.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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